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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PATRICIA CORBIN,

Plaintiff and Respondent,

v.

AMY RENEE SECRESS,

Defendant and Appellant.

H037552

(Monterey County
Super. Ct. No. MP20150)

I. INTRODUCTION

This appeal arises from a trust action involving the Roberts Trust, dated December 18, 1990 (the Trust). Respondent Patricia Corbin is the sister of the decedent, Melvin R. Roberts. Corbin asserts that she is a trustee and beneficiary of the Trust as amended in 2003. Appellant Amy Renee Secress, a self-represented litigant, was Roberts's caregiver at the end of his life. According to Secress, she is a trustee and beneficiary of the Trust as amended in 2006 and 2008.

After Corbin filed a petition to revoke the 2006 and 2008 amendments to the Trust in the probate court, Secress responded by filing a petition to enforce the no contest clause of the 2003 amendment to the Trust. The court sustained Corbin's demurrer to the first amended petition to enforce the no contest clause without leave to amend, and ordered dismissal of the petition.

On appeal, Secress contends that the court erred in determining that the no contest clause in the 2003 amendment to the Trust did not apply to Corbin's challenge to the 2006 and 2008 amendments. For the reasons that we will explain, we determine that Secress failed to meet her burden as an appellant to provide an adequate record, and therefore we will affirm the order of dismissal.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Trust

As amended and restated in 2003, the Trust named Roberts as the original trustee and Corbin as successor co-trustee. The terms of the Trust included the following provision concerning the distribution of the residue of the Trust estate: "Upon [Roberts's] death, the Trustee shall distribute the residue of the trust estate to my sister, PATRICIA CORBIN. . . ."

The 2003 amendment to the Trust also included a no contest clause: "In the event any beneficiary under this trust shall singly, or in conjunction with any person or persons, contest in any court the validity of this trust or my last will or shall seek to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that such will or any of its provisions is void, or seek otherwise to void, nullify or set aside this trust or any of its provisions, then the right of that person to take any interest given to him or her by this trust shall be determined as if the person had predeceased me with no issue."

As amended and restated in 2006, the Trust named Secress, Roberts's caregiver, as the first appointee successor trustee and Secress's family member, Brenda Zygutis, as the second appointee successor trustee. The 2006 amendment also provided that the residue of the Trust estate was to be distributed to Secress, and, if Secress predeceased Roberts, to Secress's daughter Amanda Zygutis. The 2006 amendment to the Trust omitted Corbin entirely. She was not named as either a successor trustee or a beneficiary. The no

contest clause included in the 2006 amendment is identical to the no contest clause included in the 2003 amendment.

In 2008, the Trust was again amended and restated. The 2008 amendment states that Secress and Roberts are the original trustees and names Brenda Zygutis as the successor trustee. The 2008 amendment, like the 2006 amendment, provides that the residue of the Trust estate is to be distributed to Secress, and, if Secress predeceases Roberts, to Secress's daughter Amanda Zygutis. Corbin was not named as either a trustee or a beneficiary, and the no contest clause is identical to the no contest clauses included in the 2003 and 2006 amendments to the Trust.

B. Procedural Background

Roberts died on July 4, 2010, at the age of 80. In March 2011 Corbin filed a first amended petition to revoke the 2006 and 2008 amendments to the Trust in the probate court. Secress was named as the respondent. The petition alleged that Secress was "unemployed and homeless" at the time she entered into an agreement to provide caregiver services to Roberts in exchange for room and board in Roberts' home.

In the first cause of action, which seeks revocation of the 2006 and 2008 amendments on the ground of undue influence, the petition further alleges that "[a]t the time [Roberts] executed the 2006 and 2008 Trust Amendments, [he] was not following the dictates of his own will, but rather, was acting wholly under the influence of [Secress], who was active in procuring the execution of the document, which was not the free and voluntary act of [Roberts] but was procured to be made by the undue influence of [Secress]." The remaining causes of action in the petition alleges, among other things, that Secress breached the trust and committed elder abuse and conversion, and seek invalidation of the gifts to Secress, her removal as trustee, and an accounting.

In June 2011, Secress, who was self-represented, filed a petition to enforce the no contest clauses “of the Roberts Family Trust.”¹ In her memorandum of points and authorities, Secress stated that Corbin’s petition to revoke the 2006 and 2008 amendment to the Trust constituted a “direct contest” and therefore she had filed a petition to enforce the no contest clauses.

The record reflects that Secress subsequently filed a first amended petition to enforce the no contest clause, but the record on appeal does not include the first amended petition. The record also reflects that Corbin filed a demurrer to the first amended petition to enforce the no contest clause, but the record also lacks a copy of the demurrer and any documents filed in conjunction with the demurrer, such as a memorandum of points and authorities.

Included in the record on appeal is Secress’s opposition to the demurrer, in which she argued that Corbin’s petition to revoke the 2006 and 2008 amendments to the Trust triggered the no contest clause in the 2003 Trust amendment.

Also included in the record on appeal is Corbin’s reply to Secress’s opposition to the demurrer. Corbin asserted that Secress could not enforce the 2003 Trust amendment’s no contest clause because the issue in the case was the validity of the 2006 and 2008 Trust amendments. Since Corbin was not listed as a beneficiary in either the 2006 or 2008 Trust amendments, she argued that the no contest clauses in those later amendments did not apply to her. Alternatively, Corbin argued that the first amended petition to revoke the 2006 and 2008 Trust amendments does not constitute a direct contest under section 21350, subdivision (a)(6), which states: “Except as provided in Section 21351 [exceptions to section 21350], no provision, or provisions, of any

¹ Probate Code section 21310, subdivision (c) states: “ ‘No contest clause’ means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.”

All further statutory references are to the Probate Code unless otherwise indicated.

instrument shall be valid to make any donative transfer to any of the following:

[¶] . . . [¶] A care custodian of a dependent adult who is the transferor.”

In the order after hearing filed on September 29, 2011, the court ruled as follows: “[T]he court sustains [Corbin’s] demurrer without leave to amend. In sustaining the demurrer, the court notes that this case involves the 2006 and 2008 trust amendments to the Roberts Trust and the no contest clauses within those amendments apply only to beneficiaries. Because [Corbin] is not a beneficiary under either the 2006 or 2008 trust amendments, the no-contest clauses do not apply to her. The issue is therefore moot. [Secress’s] Petition to Enforce the No-Contest Clause of the Roberts Trust is dismissed.”

Secress thereafter filed an amended notice of appeal from the court’s September 2, 2011 minute order sustaining the demurrer without leave to amend. In an order dated January 24, 2012, this court on its own motion deemed the appeal to have been filed as of the date of the September 29, 2011 judgment.

III. DISCUSSION

A. The Parties’ Contentions

We understand Secress to argue on appeal that the trial court erred in sustaining Corbin’s demurrer without leave to amend because the no contest clause in the 2003 amendment to the Trust must be construed to bar Corbin, as a beneficiary of the 2003 Trust amendment, from contesting any future amendments to the Trust.

Corbin disagrees. She reiterates her arguments below that the no contest clause in the 2003 Trust amendment is not enforceable against her because she is not contesting the validity of the 2003 Trust amendment, and, in any event, her petition to revoke the 2006 and 2008 amendments does not constitute a direct contest pursuant to section 21350, subdivision (a)(6).

B. Appealability

At the outset, we will address the threshold issue of appealability. “The existence of an appealable judgment is a jurisdictional prerequisite to an appeal. Thus, this court is

obligated to review the question of appealability. [Citations.]” (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1292.) “Accordingly, if the order or judgment is not appealable, the appeal must be dismissed. [Citation.]” (*Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 302.)

Secress states that the order dismissing her petition to enforce the no contest clause is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1) and section 6325, subdivision (a)(2). We disagree, since neither section governs the right to appeal in probate matters.

Code of Civil Procedure section 904.1, subdivision (a)(1), generally provides: “An appeal . . . may be taken from any of the following: [¶] From a judgment, except . . . an interlocutory judgment” Section 6325, subdivision (a)(2) concerns jurisdiction, not appeals, and states: “(a) The court in which the proceedings are pending for administration of the estate of the decedent has jurisdiction, before or after payment or transfer of benefits and rights or their proceeds to the trustee, to: [¶] . . . [¶] (2) Determine the terms of the trust.”

The right to appeal in probate matters is governed by Code of Civil Procedure section 904.1, subdivision (a)(10), which expressly provides: “An appeal . . . may be taken from any of the following: [¶] . . . [¶] From an order made appealable by the provisions of the Probate Code” Thus, “[i]n probate matters, there is no right of appeal unless the Probate Code specifically authorizes an appeal from the challenged order. [Citation.]” (*Estate of Dito* (2011) 198 Cal.App.4th 791, 799, fn. 5 (*Dito*).)

In her respondent’s brief, Corbin states that the order sustaining the demurrer to the petition to enforce the no contest clause is appealable as a final adjudication of all causes of action. She relies on the decision in *Dito* for that proposition, but *Dito* is distinguishable.

The appellate court in *Dito* determined that an order entered in a probate proceeding, which sustained a demurrer without leave to amend and finally disposed of

all causes of action, involved a petition that could have been brought as a separate civil action and therefore the order was appealable (once the court amended the order to specify that it was a judgment of dismissal), under section 1300, subdivision (k). (*Dito, supra*, 198 Cal.App.4th at pp. 799-800, fn. 5.) Under section 1300, subdivision (k), an appeal may be taken from an order in a proceeding under the Probate Code “[a]djudicating the merits of a claim made under Part 19 (commencing with Section 850) of Division 2.” Section 850 et seq. “governs conveyances or transfers of property claimed to belong to a decedent or other person.” (*Estate of Kraus* (2010) 184 Cal.App.4th 103, 110.) Thus, section 1300, subdivision (k) does not apply to an appeal from an order dismissing a petition to enforce a no contest clause.

The Probate Code does provide a right to appeal an order, with a respect to a trust, “[d]etermining whether an action constitutes a contest under former Chapter 2 (commencing with Section 21320) of Part 3 of Division 11” (§ 1304, subd. (d).) That type of order is distinguishable from an order dismissing a petition to enforce a no contest clause, however. Under former section 21320, an appealable order grants or denies a motion or application “filed by persons contemplating actions which potentially constitute will contests *before* taking such action.” (*Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1072 [order summarily adjudicating claim that petition violated a will’s no contest clause was not appealable].)

We need not resolve the issue of appealability on this record, however. Even assuming, without deciding, that the probate court’s order sustaining the demurrer without leave to amend and dismissing the petition to enforce a no contest clause is appealable, we find that Secress’s failure to meet her burden as an appellant is fatal to her contentions on appeal. For that reason, we will provide an overview of the pertinent rules that govern our appellate review and also place certain burdens on the appellant, including the burden of providing an adequate record.

C. Adequate Record

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. “ ‘All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Therefore, a party challenging a judgment or an appealable order “has the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

“ ‘A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.’ [Citations.]” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 (*Gee*); see also *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [record lacked copies of motion and opposition; issue resolved against appellant due to inadequate record].) Thus, where the appellant fails to provide an adequate record as to any issue the appellant has raised on appeal, the issue must be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

Secress is not exempt from compliance with the rule that an appellant must provide an adequate record because she is representing herself on appeal. “Under the law, a party may choose to act as his or her own attorney. [Citations.] ‘[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]’ [Citation].” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) Thus, a self-represented litigant is not entitled to lenient treatment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

Although Secress challenges the order sustaining the demurrer to the first amended petition to enforce the no contest clause without leave to amend, the record lacks the first amended petition, as well as the demurrer and any documents filed in

conjunction with the demurrer, such as a memorandum of points and authorities. Our standard of review for an order sustaining a demurrer without leave to amend is de novo, which requires independent review of the complaint (*Committee for Green Foothills v. Santa Clara Bd. of Supervisors* (2010) 48 Cal.4th 32) or the petition (*Quick v. Pearson* (2010) 186 Cal.App.4th 371, 377-378, 380). Since the record lacks the crucial documents—the first amended petition and the demurrer papers—that are necessary for meaningful independent review, we determine that the record is inadequate as to the issues Secress raises on appeal regarding the merits of the demurrer. (See *Gee, supra*, 99 Cal.App.4th at p. 1416.) We will therefore affirm the order sustaining the demurrer to the first amended petition to enforce the no contest clause without leave to amend and dismissing the petition.

IV. DISPOSITION

The September 29, 2011 order sustaining the demurrer to the first amended petition to enforce the no contest clause without leave to amend and dismissing the petition is affirmed. Costs on appeal are awarded to respondent Patricia Corbin.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.